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RULES CLEARINGHOUSE

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CLEARINGHOUSE RULE 98-050

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]

1. Statutory Authority

a. Depending upon how “practice in this state,” as it appears in s. 40.65 (2) (b) 2., Stats., is interpreted, s. ETF 52.06 (5) (b) may arguably conflict with s. 40.65 (2) (b) 2., Stats.

b. Does the department have authority to deny, under s. ETF 52.06 (8), an application for duty disability benefits based on failure of the *employer* to submit the required information? Section ETF 52.06 (8) penalizes the employee for a failure on the part of the employer.

c. In light of the specificity of the last sentence of s. 40.65 (3), Stats., one could argue that s. ETF 52.06 (10), to the extent that it allows denial of an application for simply submitting false information, regardless of whether eligibility requirements are otherwise met based on accurate information submitted, exceeds the scope of the department’s authority. On the other hand, the department can argue that sub. (10) is merely a reasonable extension to the application process of the authority granted under s. 40.65 (3) that applies when a person is already receiving monthly benefits.

d. Is the second sentence of s. ETF 52.16 (2) consistent with the use of “payable” in s. 40.65 (5) (b) 1., Stats.? [*cf. Coutts v. Wisconsin Retirement Board*, cited in the department’s analysis.]

2. Form, Style and Placement in Administrative Code

a. An introductory clause that follows the format in s. 1.02 (1), Manual, should be included. Further, if the secretary is promulgating the rule under s. 40.03 (2) (i), Stats., there is no indication that the rule has received the required approval of the board.

b. In s. ETF 52.01 (1), “This chapter applies” should replace “These rules apply.” In sub. (2), “chapter” should replace “rule.”

c. In s. ETF 52.02 (1), “under” should replace “as provided in” and the material beginning with the comma may be deleted from the definition.

d. In s. ETF 52.02 (4), the second “concerning” could be replaced by “of.”

e. In s. ETF 52.02 (6), “under” should replace “in accord with.”

f. The title of s. ETF 52.04 would be more descriptive if it were revised to read: **“Department authority and duties.”**

g. The title to s. ETF 52.04 (1), given the nature of the other subsection titles, should be revised to “ADMINISTER.”

h. Consideration should be given to relocating s. ETF 52.04 (4). Arguably, it deserves separate section status and might most appropriately be located at or near the end of the chapter.

i. In s. ETF 52.04 (5), “any” should be “a.” Also, “day” should be inserted after “first.”

j. Section ETF 52.06 (1) should begin as follows: “An application for duty disability benefits made on or after May 3, 1988 shall be filed with” Further, “any,” as it appears in the subsection, should be replaced by “an.” For consistency with other provisions, “former” should precede “department of.”

k. In s. ETF 52.06 (2) (b), “deemed to be” should be deleted. It is suggested that the Note following par. (b) be placed after sub. (5).

l. In s. ETF 52.06 (3) (e), “to the application” should be added to the end of the sentence.

m. In s. ETF 52.06 (5), third sentence, the reference to a “non-qualifying” report fails to use a defined term. [See s. ETF 52.02 (7); the proper reference would be to a report that is not a qualifying medical report.]

n. The Note following s. ETF 52.06 (5) (a) is substantive. [See s. 1.09 (1), Manual.]

o. Section ETF 52.06 (6) (a) should read: “A participant may withdraw his or her application and, upon withdrawal, the application is void.”

p. In s. ETF 52.06 (7) (a) (intro.), “one of the following” should replace “either.”

q. Is there a form for the certification, admission and statement referenced in s. ETF 52.06 (7) (a)? If so, see s. 1.09 (2), Manual.

r. In s. ETF 52.06 (7), is the omission of a par. (b) intentional? In par. (c), “to the requirement of par. (a)” should be added following “addition” in the first sentence.

s. Consideration should be given to relocating s. ETF 52.06 (9) or giving it separate section status.

t. In s. ETF 52.08 (1), “determined under” should be substituted for “provided in.”

u. In s. ETF 52.08 (2), “for duty disability benefits” should be added after “eligibility.” In this regard, see also subs. (3) and (4).

v. In s. ETF 52.08 (3) “is” should be substituted for “shall be”; and “the” should be substituted for “such” (all in the first sentence). In the second sentence, the first “the” can be eliminated.

w. In ss. ETF 52.08 (4) and 52.10 (1) (intro.), “is” should be substituted for “shall be.”

x. In s. ETF 52.10 (2), can “effective date is” be substituted for “department shall deem the application to be”?

y. In s. ETF 52.12 (1) (a) 2., the comma after “occurred” should be deleted and “deemed to be” should be deleted.

z. In s. ETF 52.12 (1) (b), “the” should be substituted for “such.” This change should be made in several provisions of the rule.

aa. In s. ETF 52.12 (1) (c) (intro.), last sentence, “then instead multiply” should be deleted and “shall be multiplied” should be inserted after “paid.”

ab. In s. ETF 52.12 (1) (c) 1., a reference to “this employer” is awkward.

ac. In s. ETF 52.12 (2), “also” should be deleted.

ad. In s. ETF 52.14 (1), “in” should replace “by” in all three instances. In the first sentence, “is” should replace “shall be.”

ae. In s. ETF 52.14 (2) and (3), “does” should replace “shall.”

af. As drafted, the first sentence of s. ETF 52.16 (1) (a) is more appropriately placed in a note than in the text of the rule.

ag. In s. ETF 52.16 (1) (c), “apply to” should be eliminated.

ah. In s. ETF 52.16 (4) (a) 2., the first “then” should be eliminated.

ai. In s. ETF 52.16, “(3) UNEMPLOYMENT COMPENSATION. [*Reserved.*]” should be deleted.

aj. The title to s. ETF 52.16 (4) (a) should be underscored, not contained in single quotation marks.

ak. The acronym “OASDHI” is used in s. ETF 52.16 (2). It should be spelled out or defined.

al. In s. ETF 52.16 (4) (c), “Any and all” should be eliminated from the first sentence.

am. Section ETF 52.16 (5) (b) contains only one subdivision and sub. (6) contains only one paragraph. [See s. 1.03 (intro.), Manual.] It is suggested that par. (b) 1. be combined with par. (b) (intro.) and that sub. (6) (a) simply be sub. (6).

an. In s. ETF 52.18 (1), it appears that “consistently” may be substituted for “on a regular and steady basis.”

ao. In s. ETF 52.22 (1), “the participant’s” should be substituted for “his” in two locations.

ap. In s. ETF 52.22 (2) (intro.), “are” should be substituted for “will be”; in pars. (a) and (b), “does” should be substituted for “shall.”

aq. The second s. ETF 52.24 should be numbered s. ETF 52.26.

4. Adequacy of References to Related Statutes, Rules and Forms

a. Pertinent citations may be missing from the listing of statutes providing authority for the rule and of statutes being interpreted. For example, see ss. 40.02 (22) (b) 14., 40.03 (1) (L) and 40.08 (4), Stats. A review of statutes utilized in this regard is in order.

b. In s. ETF 52.02 (7), “Stats.” should follow the statutory reference. [See s. 1.07 (2), Manual.] This comment applies in a number of instances throughout the rule.

c. In s. ETF 52.04 (3), it appears that both references to “section” should instead be to “chapter.”

d. In s. ETF 52.06 (7) (c), “to the requirement of par. (a),” should precede the first comma. The definition section should indicate that “municipal fire fighter” has the meaning given in s. 891.45, Stats. In the second sentence of the paragraph, “, if it applies,” should replace “in such cases.”

e. In s. ETF 52.10 (1) (a), it is suggested that “as determined under s. ETF 52.06 (2)” be inserted after “received.”

f. In the Note following s. ETF 52.14 (2), “act” should be deleted. For similar treatment, see the Notes to sub. (3) and to s. ETF 52.22 (2) (a) and (b).

g. In s. ETF 52.16 (1) (c), the clause “Except as otherwise expressly provided for receipt of lump sum worker’s compensation benefits or disability and retirement benefits” is inadequate. Specific reference should be given to the provisions that provide otherwise.

h. In s. ETF 52.16 (2), second sentence, it appears that “payments made in error” should be deleted and replaced by “an overpayment of duty disability benefits as provided in s. ETF 52.20.”

i. In s. ETF 52.16 (4) (a) (intro.), it appears that the reference to s. ETF 52.14 (1) should be to the entire section, not solely to sub. (1).

j. In s. ETF 52.22 (2) (intro.), it appears that “, 1985-86 Stats.” should be deleted.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The usefulness of the department’s analysis would be enhanced if the provisions of the rule being described were cited.

b. In the first sentence of the first full paragraph on page 4 of the department’s analysis, the first comma should be deleted and “and” should be placed between the two terms within quotes. In the following paragraph, “concerns” in the first sentence should be in the singular.

c. In s. ETF 52.02 (3), it appears that “one” and the comma that follows should be deleted. Note that the examples following the definition of the term “lump sum payment” do not seem to reflect the term as defined. The definition says nothing about excluding the current benefit payment period from the term.

d. The necessity to define some of the terms for purposes of the entire chapter is unclear. In other words, if a term is only used in one provision of the rule, consideration should be given to defining the term only for purposes of that provision or incorporating the definition into the text.

e. Should the qualification “on other than a merely temporary basis” also apply to s. ETF 52.06 (3) (e)?

f. In s. ETF 52.06 (7) (c), it appears that the second sentence is intended to imply that the department may grant the application if the presumption under s. 891.45, Stats., is not overcome. See, generally, ch. 903, Stats., for the legal effect of a statutory presumption. Note, also, 1997 Enrolled Senate Bill 329.

g. In s. ETF 52.06 (9) (c) 3., second sentence, “criteria” should be “criterion.”

h. Is it possible under s. ETF 52.08 to have more than one qualifying date? For example, if a temporary but continuous reduction in position continues until the employer terminates the employee because of the disability, is there a qualifying date based on reduction in position and on termination of employment? See, in particular, the second sentence of s. ETF 52.08 (3). This appears to be addressed to some degree by s. ETF 52.12 (1) (a) 2. The relationship of the latter provision with s. ETF 52.08 should be reviewed.

i. Is the first sentence of s. ETF 50.12 (2) intended to mean that an employer’s calculation of a participant’s monthly salary will in all cases be reviewed by the department? If so, the provision should state this.

j. Is s. ETF 52.12 (3) necessary given s. ETF 52.04 (4)?

k. In s. ETF 52.14 (1), second sentence, is the inclusion of “not” correct?

l. Section ETF 52.16 (4) (b) is awkwardly drafted and its relationship to par. (c) is not clear. Perhaps more consistent use of terms such as “payable,” “paid” and “received” would help clarify the two paragraphs. In addition, is the last sentence of par. (c) redundant given the first sentence of par. (c)?

m. Is s. ETF 52.16 (5) (b) 1. redundant, given the general provision of par. (b) (intro.)?

n. In s. ETF 52.24 (1), should the second sentence read as follows: “The department shall request the records at least annually and, upon request, the person shall supply the records to the department”?